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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHELBIE STEVENS, Plaintiff and Appellant, v. AZUSA PACIFIC UNIVERSITY et al., Defendants and Respondents.	B286355 (Los Angeles County Super. Ct. No. BC555710)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Broadbelt III, Judge. Affirmed.

Kirbys Law, James W. Kirby and Steven C. Kirby, for Plaintiff and Appellant.

Kjar, McKenna & Stockalper, Patrick E. Stockalper and Melissa M. Wetkowski, for Defendants and Respondents.

When matriculating at defendant Azusa Pacific University (APU), plaintiff Shelbie Stevens decided to try a new activity and joined the APU cheerleading team. She quickly suffered two head injuries during practices, which led her to consult with two physicians, including a doctor at the APU student health center. Both doctors diagnosed a concussion. The doctor at the APU student health center advised Stevens not to attend cheer practice until she was symptom free for a number of days, at which point he believed it would be safe for Stevens to return to physical activity. Stevens followed that advice, and sat out for what amounted to approximately one month. When she rejoined the team, Stevens practiced for two additional months without incident. She was then struck again on the head, this time with what she alleges are continuing neurological consequences.

Stevens filed suit against APU and its cheerleading coach, Rosie Francis, asserting claims for negligence. The trial court granted summary judgment in favor of defendants, finding the claims barred by the doctrine of primary assumption of the risk. Stevens now appeals from that order. Like our colleagues in Division Six of this District, "[w]e sympathize with an injured cheerleader and any student injured while participating in extracurricular activities which are inherently dangerous. Such activities are, however, voluntary. There are benefits and burdens associated with such activities. Unfortunately, some students participating in such activities are injured. As we shall explain, the doctrine of primary assumption of the risk bars a cheerleader's negligence lawsuit against the school" and in this instance its coach. (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1115 (*Aaris*).)

FACTUAL BACKGROUND

In reciting the facts, we consider the evidence in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703.) Any doubts are resolved in favor of Stevens as the party opposing summary judgment. *(Frank and Feedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 469.)

A. Plaintiff Joins the APU Cheer Team

In the summer of 2012, Stevens was 18 years old and an incoming first-year student at APU. Stevens tried out for the APU cheerleading team and was accepted. While the parties dispute her level of prior gymnastics and tumbling experience, it is undisputed she had not previously participated in cheerleading. At APU, cheerleading is not an intercollegiate sport (in contrast to acrobatics and tumbling, which are), but a support program for intercollegiate athletic teams.

The cheer team coach in 2012 was Rosie Francis, who was in her first year in that position. Coach Francis had been a collegiate cheerleader, but had no prior coaching experience and was not yet certified by the American Association of Cheerleading Coaches and Administrators (AACCA) when practices began in August 2012. Coach Francis did, however, receive her AACCA certification in November 2012, before the final injury at issue in this matter. The online training Francis did for her AACCA certification included guidelines related to concussions.

Stevens participated in the APU cheer team as a baser. Cheerleading positions include basers and flyers. Basers, as the name implies, form the foundation of various formations and stunts. Flyers are the individuals lifted or thrown into the air by basers during stunts.

B. Plaintiff's First Injury

In August 2012, Coach Francis held a four-day training camp. The first day involved meeting and greeting other team members, followed by three days of stunt training. On the second day of camp, Stevens was acting as a base during a stunt. A flyer fell, and during the fall her foot skidded onto and across Stevens's head. Following the impact, Stevens felt confused, nauseous, dizzy and exhausted. Coach Francis saw the formation collapse but testified she did not see the injury; Stevens did not contradict this, and did not independently tell Coach Francis about the incident.[1] Stevens asked to sit out and did so briefly (no more than five minutes), before returning and continuing stunting. Before returning, Stevens did not inform Francis that she had been hit, felt unwell, or that she was unwilling or unable to rejoin the practice. During the remainder of the practice, Coach Francis did not observe anything in Stevens's actions suggesting Stevens had a concussion.

The following day, Stevens experienced ocular disturbances she later described as "visual snow." Stevens did not alert Coach Francis or others at APU to any of these symptoms. Nor did Stevens seek any medical care after this initial injury. Stevens continued to practice with the team without further incident until September 7, 2012.

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[1] Both Stevens and Francis testified that Francis was not informed about the training camp injury until after Stevens was injured again on September 7, 2012.

C. Plaintiff's Second Injury

During a September 7, 2012 practice, Stevens was performing a "basket toss," in which basers hold onto one another's arms to launch and then catch a flyer. During the stunt, Stevens made head to head contact with another baser as they leaned in towards each other. Coach Francis observed the contact, and directed Stevens to sit out for the remainder of the practice, which Stevens did. The parties dispute whether Coach Francis asked concussion protocol questions about Stevens's symptoms and told Stevens to see a doctor—Francis says she did both, while Stevens says Francis did neither. Stevens did go to the hospital after practice, but left without being seen because the wait time was too long.

Two days later, Stevens went to a different hospital and was diagnosed with a concussion. Stevens was given an "off school" note indicating she should not return to school for a few days (Stevens recalled being told 3—5 days), and was told she should not participate in any cheerleading or other activity with a risk of repeat injury for the next nine days.

Stevens was still not feeling well after five days, and saw a doctor at the APU student health center on September 14, 2012. She returned to the student health center on September 17, 19 and 24, 2012 and met each time with the same doctor. On September 17, 2012, Stevens was advised not to go to class or participate in cheer. On September 19, 2012, Stevens was told she could return to class but to limit her studying, and not to exert herself physically. Stevens was given a note during this September 19th visit, which she in turn provided to Coach Francis, stating that Stevens still had a severe concussion, and

could not cheer until at least five days after Stevens was first symptom free. Following an examination on September 24, 2012, the doctor advised Stevens she could gradually begin resuming normal activities over the next three days, and could thereafter engage in full activity provided she remained asymptomatic over those three days of gradually increasing activity.

While the parties dispute whether Coach Francis pressured Stevens to attend practices during this time, it is undisputed Stevens did not participate in cheerleading between the time of the September 7, 2012 injury and at least September 27, 2012. Stevens and Francis did not recall the exact date Stevens returned to practice, but both testified it was in late September or October 2012 and in compliance with the timeline established by the doctor at the student health center for Stevens's return.

D. Plaintiff's Third Injury

When Stevens returned to practice, she told Coach Francis she was still not 100 percent. Stevens resumed doing cheers, but did not stunt. While others stunted, Stevens did lunges, push-ups and sit-ups. After a period of time (the record is unclear as to how long), Stevens began stunting again.

During a practice on November 28, 2012, Coach Francis asked Stevens to attempt a stunt with two other individuals taller and heavier than her.[2] Stevens told Coach Francis she was not 100 percent comfortable doing the stunt with these other individuals, but Francis and the team members pushed Stevens

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[2] Before the trial court, Stevens equivocated over whether the third injury occurred on November 28, 2012 or later in November, or in December 2012. She takes the position before us that the third injury occurred on November 28, 2012.

to participate. Stevens was unable to sustain her base position, the formation they were practicing collapsed, and a flyer fell on Stevens's head. Subsequent medical examination indicated this impact concussed Stevens, and that she had suffered associated brain damage.

Stevens did not practice thereafter, and resigned from the cheer team in early January 2013. She continues to suffer from visual disturbances, light and noise sensitivity, dizziness, fatigue, and neck and back pain.

PROCEDURAL BACKGROUND

Approximately a year and half after she resigned from the cheer team, Stevens sued APU and Coach Francis, asserting a single claim of negligence. Soon thereafter, Stevens filed a first amended complaint alleging the negligence included the lack of proper training to perform stunts, the lack of a concussion protocol, and a failure to adequately supervise and monitor injured cheer participants. Following defendants' filing of a summary judgment motion, the court granted Stevens leave to file a second amended complaint asserting an additional cause of action against APU for negligent hiring, training, and supervision of Coach Francis.

The parties were permitted supplemental summary judgment briefing on the new claim. In support of her opposition to summary judgment, Stevens submitted two expert declarations opining that APU and Coach Francis failed to meet the applicable standard of care and thereby increased the risk of injury to Stevens. The first declaration was from Dr. Vernon Williams, a board-certified neurologist specializing in sports

injuries. The second was from Chris Chamides, a collegiate soccer coach with no cheer-related experience.

The court held oral argument on August 11, 2017 and took the summary judgment motion under submission. On August 29, 2017, the court issued a 13-page written order granting summary judgment, finding Stevens's claims were barred by primary assumption of the risk. In reaching that decision, the court sustained defendants' objections to significant portions of the Williams and Chamides expert declarations.[3]

Following entry of judgment, Stevens filed a motion for new trial, which was denied on October 27, 2017. Stevens filed a timely notice of appeal from the orders granting summary judgment and denying a new trial. (Cal. Rules of Court, rule 8.108(b)(1).)[4]

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[3] The court issued a written tentative prior to argument denying the motion. While Stevens asserts differences between the initial tentative and the court's final order are an independent ground for appeal, we discuss only the court's final order as the court retained the power to change its order until judgment was entered. (*Bay World Trading, Ltd. v. Nebraska Beef, Inc*. (2002) 101 Cal.App.4th 135, 141; see also *Whyte v. Schlage Lock Co*. (2002) 101 Cal.App.4th 1443, 1451 [court's prior opinions cannot be used to impeach its final decision].)

[4] Stevens erroneously appeals from the orders granting summary judgment and denying a new trial, rather than from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19 [order denying a motion for new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment] (*Walker*); *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7 [direct appeal does not lie from an order granting

DISCUSSION

A. Standard of Review

"A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. [Citation.] A moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 847—848 (*Eriksson*).)

"We review the order granting summary judgment de novo to determine whether there are any triable issues of material fact." (*Aaris*, *supra*, 64 Cal.App.4th at p. 1117.) "The existence and scope of a defendant's duty of care [to the plaintiff] is an issue of law to be decided by the court." (*Eriksson*, *supra*, 191 Cal.App.4th at p. 838.) "As such, it is generally amenable to resolution by summary judgment." (*Ibid*.)

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summary judgment]; Code Civ. Proc., § 904.1, subd. (a)(1).) In the interests of justice and to avoid delay, we construe the appeal of the rulings on the summary judgment and new trial motions as being from the judgment. (*Walker*, *supra*, 35 Cal.4th at p. 22; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1407, fn. 2.)

While the parties both state the standard of review for evidentiary rulings made in connection with a summary judgment motion is abuse of discretion (citing *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169), we note the standard of review is unsettled. (*In Re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141 [collecting cases discussing whether abuse of discretion or de novo review applies].) We need not resolve this issue, as our conclusions with regard to the trial court's evidentiary rulings would be the same under either the abuse of discretion or de novo standard of review.

B. Primary Assumption of the Risk

" 'Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities—and, specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.' (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) The primary assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect. [Citations.]" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*).)

Under the primary assumption of risk doctrine, the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate, and the defendant generally owes no duty to protect the plaintiff from those risks. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 486.) "[A] court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of

the sport and the defendant's role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161.)

In evaluating the fundamental nature of the sport, we note at least one court has found cheerleading is an inherently dangerous athletic activity. (*Aaris*, *supra*, 64 Cal.App.4th at p. 1115.) "Being a modern cheerleader requires team work, athletic skill, physical strength, and the courage to attempt a potentially dangerous gymnastic stunt." (*Id*. at p. 1115, fn. 1.) Cheerleading involves striving to build human formations and individuals flying up into the air and coming back down with the aid of others. This, combined with the ineluctable law of gravity, poses risks of physical injury. (*Id*. at pp. 1114—1115.) Given the nature of modern cheerleading, possible physical injuries include blows to the head that may result in a concussion.

With regard to the defendants' role in or relationship to the sport, sponsoring organizations and instructors/coaches are not insurers of student safety. (*Balthazor v. Little League Baseball, Inc*. (1998) 62 Cal.App.4th 47, 50 (*Balthazor*).) A sponsor of athletic activity "posing inherent risks of injury ha[s] no duty to reduce or eliminate those risks, but do[es] owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa*, *supra*, 55 Cal.4th at p. 1162.) As for coaches, "[t]o the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. [Citation.]

Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments. [Citations.] [¶] These principles are in line with the underlying policy of not creating a 'chilling effect on the activity itself, nor . . . interfering with the ability of the instructor to teach the student new or better skills.' " (*Eriksson*, *supra*, 191 Cal.App.4th at p. 845.)

C. Summary Judgment Was Appropriately Entered on the Negligence Claim

1. Defendants Satisfied Their Initial Burden

The parties do not dispute that cheerleading is inherently risky, and that our analysis must be guided by the doctrine of primary assumption of the risk. Nor does plaintiff dispute that defendants met their initial burden of production to make a prima facie showing that no triable issue of material fact exists, including through expert declarations from Dr. Gary Green, a clinical professor at the UCLA Division of Sports Medicine, and Jennifer Long, a AACCA certified cheer coach at both the high school and college level.

2. Defendants Did Not Increase the Inherent Risks of Cheerleading

As the burden was shifted to plaintiff, Stevens was required to demonstrate triable issues of material fact that defendants unreasonably increased the risks of injury beyond those inherent in the sport. Stevens first argues that defendants unreasonably increased the inherent risk of injury by: (1) failing to do baseline mental and physical testing of team members prior

to any participation, (2) failing to have a person present during practice with specific training on concussion recognition, (3) failing to perform medical evaluations of Stevens after she suffered a head injury, (4) failing to ensure injured team members like Stevens receive medical treatment after injury, (5) failing to implement a "return to play" protocol involving professionally supervised and graduated mental and physical testing after injury (including comparisons to pre-participation baseline testing) before a player is cleared to return to practice, and (6) failing to inform Stevens of second impact syndrome (that is, the danger of suffering a second impact while a previous concussion has not yet healed).

While warning participants of certain risks, providing a preparticipation mental and physical measurement baseline in the event of injury, ensuring prompt medical attention for any injury and having a professionally supervised protocol with graduated mental and physical testing to clear a player before she returns to action would all likely decrease the inherent risks of cheerleading, the failure to do these things does not increase the inherent risks of the sport. Instead, the purpose of each action urged by plaintiff is to decrease the potential severity of an injury by ensuring it is promptly addressed and remediated. Numerous cases have rejected the argument that athletic sponsors and instructors owe these types of duties to decrease risk, and we find no reason here to deviate from their reasoning. (E.g., *Nalwa*, *supra*, 55 Cal.4th at pp. 1163—1164 [no duty to prevent injuries from bumper car ride]; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 39 [no duty to mitigate the inherent risk of being hit by an errant golf shot] (*American Golf*); *Balthazor*, *supra*, 62 Cal.App.4th at p. 52 [no duty to

provide faceguard on little league batting helmet]; *Fortier v. Los Rios Community College Dist*. (1996) 45 Cal.App.4th 430, 439-440 [no duty on touch football sponsor to provide protective headwear]; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12 [ski resort not obligated to pad ski lift towers].)

We are also cognizant of the potential cost the duties urged by plaintiff would impose. Plaintiff claims there would be no meaningful financial imposition here because APU already has athletic trainers and other personnel on campus who could discharge the duties plaintiff urges us to impose. As the trial court noted, Stevens's argument is essentially that APU should have classified cheer as an athletic team rather than a club, so the cheer team would have access to all athletic resources. Requiring such access would chill a school from creating clubs when it lacks the resources to create official teams, resulting not in more teams but fewer clubs.

Furthermore, a rule imposing the types of duties alleged by plaintiff here on any sporting activity with a concussion risk would encompass not only schools like APU, but also other organizations without extensive budgets or paid staff like adult recreational clubs and leagues, and youth sports organizations. California has established concussion protocols for youth sports organizations. (E.g., Health & Saf. Code, § 124235.)[5] The duties urged by plaintiff here go beyond those statutorily mandated—for

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[5] We cite this statute for illustrative purposes as it was enacted several years after the events at issue in this case (Stats. 2016, ch. 516, § 1, eff. Jan. 1, 2017), and applies to entities in which persons 17 years of age or younger participate (Health & Saf. Code, § 124235, subd. (b)(3).)

example, preparticipation baseline medical testing and guaranteed medical care in the event of an injury (which would be necessary to ensure medical evaluation and treatment after an injury, as plaintiff urges). Those duties would impose additional costs either on the organizations or participants in them. "The primary assumption of risk doctrine helps ensure that the threat of litigation and liability does not cause such recreational activities to be abandoned or fundamentally altered in an effort to eliminate or minimize inherent risks of injury." (*Nalwa*, *supra*, 55 Cal.4th at p. 1162.)

While we reject Stevens's expansive duty of care arguments, permitting an injured player to continue participating after an initial injury has been held to increase a sport's inherent risk. (E.g., *Wattenberger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746 (*Wattenberger*); *Mayall v. USA Water Polo, Inc.* (9th Cir. 2018) 909 F.3d 1055 (*Mayall*).) In *Wattenberger*, a high school baseball player performed a pitching try out for the Cincinnati Reds baseball organization. After his third pitch, the plaintiff felt his arm " 'pop' " but experienced no particular pain. He informed the Reds' scouting supervisor and others that his arm popped. Receiving no response, he returned to the mound and threw another pitch which caused bone and tendon damage to his arm. (*Wattenbarger*, *supra*, 28 Cal.App.4th at pp. 749—750.) In *Mayall*, the plaintiff was playing goalie in a water polo tournament. She was hit hard in the face and suffered a concussion. She swam to the side to speak to her coach, who returned her to play despite her being dazed. The plaintiff subsequently took more shots to the head in games later that same day, thereby suffering post-concussion syndrome. (*Mayall*, *supra*, 909 F.3d at p. 1058.)

Both the *Wattenbarger* and *Mayall* courts found the defendants in each case had potentially increased the risks inherent in the subject sport by failing to restrict the participation of a player known to be injured. (*Wattenbarger*, *supra*, 28 Cal.App.4th at pp. 753—755; *Mayall*, *supra*, 909 F.3d at pp. 1063—1064.)[6] Stevens relies on both cases to argue that defendants here impermissibly increased the risks of injury by allowing her to participate after her initial injury in training camp.[7]

The facts here are distinguishable from *Wattenberger* and *Mayall*. "Whether this general duty of care [not to increase the risks inherent in a sport] also extends to restricting participation by an injured player to avoid aggravation of an injury is primarily a question of foreseeability." (*Wattenbarger*, *supra*, 28 Cal.App.4th at p. 755.) It is undisputed that Coach Francis did not see, and was not made aware, of the August 2012 injury at the time it occurred. Coach Francis witnessed the September 7, 2012 injury. It is undisputed Francis directed Stevens to sit out the remainder of the practice, and that Stevens did not practice further that day following the injury. While Stevens asserts

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[6] We say potentially because neither case involved an appeal after trial—*Wattenberger* involved an appeal from a grant of summary judgment, and *Mayall* was an appeal from an order dismissing the complaint for failure to state a claim. (*Wattenbarger*, *supra*, 28 Cal.App.4th at p. 750; *Mayall*, *supra*, 909 F.3d at p. 1058.)

[7] Stevens asserts that *Mayall* is controlling. "[W]hile we may find lower federal court decisions on points of state law issues persuasive, they do not control." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 296.)

defendants did not ensure she received medical evaluation (a claim defendants dispute), it is undisputed she saw two doctors (including one at APU) who diagnosed a concussion and told her to refrain from activity. It is also undisputed Stevens informed Coach Francis that she had suffered a concussion, could not continue practicing, and in fact did not practice for at least a month following the September 7, 2012 injury.

While the parties contest whether Coach Francis encouraged activity in violation of the doctor's orders, this disagreement is immaterial because it is undisputed plaintiff did not begin participating in cheer again until she understood she was cleared by a doctor to do so. When Stevens resumed practice, she indicated she was still not 100 percent and accordingly did not stunt for a period of time. Plaintiff thereafter participated in cheer for approximately two more months before she suffered a third injury. Stevens points to no evidence that in the two months between her resumed participation and the November 28, 2012 injury, she informed defendants of any continuing symptoms (other than her initial statement she was still not 100 percent, which resulted in her practice activities being limited and not including any stunts), or that she exhibited any concerning behavior of which Francis was or should have been aware. While plaintiff expressed concern about performing the stunt on November 28, 2012 that resulted in her final injury, her declaration is clear that concern resulted from the other baser and flyer having different body types than Stevens.

In light of these differences from *Wattenbarger* and *Mayall*, defendants did not increase the risk of injury inherent in cheerleading by failing to stop or restrict plaintiff's participation

beyond the ways in which it was indisputably already halted and limited.

Finally, Stevens claims the risk of injury was unreasonably increased by Coach Francis's lack of qualifications, and the coach's encouragement to practice a stunt on November 28, 2012 after Stevens indicated she was not 100 percent comfortable doing it. While Stevens makes generalized allegations that Coach Francis was not sufficiently qualified or supervised, Stevens does not cite to any evidence (such as a declaration from a cheer expert) in support of this claim. Defendants submitted a declaration from an experienced AACCA certified cheer coach opining that Francis was qualified, and followed proper instructional technique. To the extent plaintiff submitted any contrary evidence, it was from a soccer coach and a medical doctor—neither of whom was competent to testify about Francis's qualifications as a cheer instructor or the instructional methods she employed. (Evid. Code, § 803; *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1262 [expert may not testify on area outside their expertise].) Accordingly, Stevens did not demonstrate a triable issue of fact regarding Coach Francis's qualifications or instructional technique.

While plaintiff further argues that it was a breach of the duty of care for Francis to encourage Stevens to perform a stunt on November 28, 2012 when she was not 100 percent comfortable with it, "[a]bsent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have

a generally deleterious effect on the sport as a whole." (*Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 532; see also *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 ["Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction."].) Plaintiff does not argue Coach Francis acted recklessly, nor does she cite to any admissible evidence suggesting recklessness in the pairing of individuals before the November 28, 2012 injury. The lack of evidence that Coach Francis took the team members involved in the November 28, 2012 accident beyond their level of experience and capability bars this claim from plaintiff. (*Aaris*, *supra*, 64 Cal.App.4th at p. 1118.)

3. The Trial Court Properly Sustained Objections to Plaintiff's Expert Declarations

As noted above, "[t]he existence and scope of a defendant's duty [of care to the plaintiff] is an issue of law to be decided by the court." (*Eriksson*, *supra*, 191 Cal.App.4th at p. 838.) Given that defendants here did not owe the duties claimed by plaintiff, the trial court did not err in ruling on plaintiff's expert declarations, in which it struck those portions of the declarations that sought to impose such duties. "It will always be possible for a plaintiff who suffers a sports injury to obtain expert testimony that the injury would not have occurred if the recreation provider had done something differently. Such expert testimony is not sufficient to establish that the recreation provider increased the inherent risks of the sport. Such expert opinion does not create a triable issue of fact on a motion for summary judgment based on

the primary assumption of the risk defense." (*American Golf*, *supra*, 79 Cal.App.4th at p. 39.)

D. Summary Judgment Was Appropriately Entered on the Negligent Hiring Claim

Stevens's claim for negligent hiring fails for the same reasons as her negligence claim. Under California law, "an employer may be liable to a third person for negligently hiring an incompetent or unfit employee." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836.) "Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) Because Coach Francis did not increase the inherent risks of cheerleading, the particular harm alleged by Stevens did not materialize. As the trial court stated, "because [Coach] Francis was not liable for harming plaintiff, APU cannot be liable for hiring Francis."

E. Stevens Abandoned Any Issue Regarding the Denial of Her Motion for a New Trial

Stevens's notice of appeal indicated she was seeking review of both the grant of summary judgment and the order denying a new trial. Stevens raises no issues regarding the motion for new trial, and we therefore deem her to have abandoned any claim with regard to the denial of that motion. (E.g., *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [failure to address a claim on appeal constitutes abandonment of that claim].)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.